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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2520-15T4

DETECTIVE SERGEANT FIRST
CLASS GEORGE GILES,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, NEW JERSEY
STATE POLICE, THE OFFICE OF THE
ATTORNEY GENERAL OF THE STATE OF
NEW JERSEY, CAPTAIN JOHN SILVER
(BADGE NO. 3583), CAPTAIN DAVID
DALRYMPLE (BADGE NO. 4514) AND
CAPTAIN RICHARD R. NUEL (RET.),

Defendants-Respondents.

Argued telephonically December 12, 2017 –
Decided March 5, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No.
L-2283-11.

George T. Daggett argued the cause for
appellant.

Adam Robert Gibbons, Deputy Attorney General,
argued the cause for respondents (Christopher
S. Porrino, Attorney General, attorney;
Melissa Dutton Schaffer, Assistant Attorney

General, of counsel; Adam Robert Gibbons, on the brief).

PER CURIAM

Plaintiff George Giles appeals from an order granting a motion for involuntary dismissal pursuant to R. 4:37-2(b) in favor of defendants, State of New Jersey (State), New Jersey State Police (NJSP), the Office of the Attorney General (OAG), and individual members of the NJSP: Captain John Silver, Captain David Dalrymple and Captain Richard R. Nuel (Ret.) (collectively defendants). We affirm.

I.

On September 12, 2011, Giles, an African American former NJSP Lieutenant, filed a lawsuit against defendants, wherein he alleged being overlooked on promotions to Lieutenant while other "white, junior[] members with less experience, education, time and grade, have systematically been promoted." An amended complaint was filed in January 2013, which alleged the following: (1) that Giles was not promoted to the rank of Lieutenant on the basis of his race, in violation of the State of New Jersey's Law Against Discrimination (LAD); (2) that the OAG "whitewashed" the investigation into his 2010 Equal Employment Opportunity (EEO) complaint; (3) that the actions of the NJSP violated its settlement agreement with the Federal Government; and (4) that, in violation

of the LAD, Captains Silver, Dalrymple and Nuel retaliated against him because he filed the EEO complaint.

II.

Prior to trial, defendants filed motions for summary judgment and motions for reconsideration, which were denied. Trial commenced on February 18, 2016. After opening statements, Giles confirmed his abandonment of count three of the complaint. The trial continued with Giles's direct examination, which included testimony focused on performance reviews he received while working in the Internal Affairs Investigations Bureau (IAB) contrasted with the performance reviews he received while working in the Intelligence Section. This testimony was in furtherance of Giles's allegation of defendants' discrimination by "suppressing" the performance evaluations he received when he worked in the Intelligence Section.

Darin E. Patrick and Ronald Hampton testified on behalf of Giles. Patrick, a former NJSP Captain, testified that he conducted a supervisory inquiry, by direction of Silver and Nuel, into Giles's conduct stemming from a drug raid. Giles alleged that this inquiry was the first of its kind, and resulted in a performance notice in his personnel file, diminishing his chance for promotion. Hampton, also a NJSP Captain, testified that during an evaluation of Giles in January 2012, Captain Joe Celli told him

to be "very critical" in completing Giles's evaluation. At the conclusion of Hampton's testimony, Giles rested.

After the conclusion of Giles's case, defendants moved for an involuntary dismissal pursuant to Rule 4:37-2(b). The parties orally argued. Two days later, Judge Anthony M. Massi issued a written opinion and order granting defendants' motions. The judge held that Giles's "performance evaluations or quarterly appraisals were not suppressed by defendants on the basis of race, nor were they done [] to prevent him from being promoted and to allow junior white officers to be promoted ahead of him." Further, the judge did not find that Giles presented any evidence "that race was involved in any way in defendants' evaluation process of [Giles]."

The judge found that Hampton's testimony regarding the performance evaluation did not show that the instruction given to him to complete the evaluation had any connection to Giles's race. The judge further held that Giles's argument that officers in his class were promoted within two to three years while he was not promoted for ten years was unsupported by credible evidence. In sum, the judge held that Giles failed to produce credible evidence to establish a prima facie case for the LAD discrimination.

With regard to the retaliation claim, each incident that Giles claimed occurred after his filed complaint to the EEO was addressed by the judge. The judge found that Giles did not present

credible evidence to support a prima facie case of retaliation under the LAD.

Giles raises the following point on appeal:

POINT I

THE DECISION OF THE COURT BELOW WAS ERRONEOUS.

A. Plaintiff's Testimony Together with the Exhibits Clearly Establish a Prima Facie case of Discrimination.

B. The Opinion of the Court Below was Inconsistent with the Law Against Discrimination as Applied to the Facts of this Case.

Pursuant to Rule 4:37-2(b), after the plaintiff completes the presentation of evidence, the defendant "may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief." "[S]uch motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." Ibid.

When an appellate court reviews a motion for involuntary dismissal pursuant to Rule 4:37-2(b), the court's task is to determine whether the evidence, along with its legitimate inferences, could have sustained a judgment in favor of the party opposing the motion. Dolson v. Anastasia, 55 N.J. 2, 5 (1969). "[D]ismissal is appropriate when no rational jury could conclude

from the evidence that an essential element of the plaintiff's case is present." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:37-2(b) (2018); see Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001).

Neither the trial court nor this court should be "concerned with the weight, worth, nature or extent of evidence, but must accept as true all the evidence supporting the party opposing the motion, and accord him the benefit of all favorable inferences." Polyard v. Terry, 160 N.J. Super. 497, 505-06 (App. Div. 1978) (citing Dolson, 55 N.J. at 5). The motion must be denied if reasonable minds could differ. Id. at 506 (citing Dolson, 55 N.J. at 5). The court may not weigh evidence in deciding this motion and must accept as true all the evidence that supports the plaintiff and give the plaintiff the benefit of every possible favorable inference that can be logically and legitimately deduced therefrom. Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc., 32 N.J. 595, 606-07 (1960).

III.

We discern the following facts from the trial record providing all favorable inferences to Giles. Dolson, 55 N.J. at 5. Giles graduated from the NJSP Academy in 1986. In June 2001, he was assigned as a Trooper I to the Intake Unit of the IAB. In this position, Giles received complaints made against officers and

ensured they were routed to their appropriate locations. In August 2001, Giles assumed the position of Staff Investigator in the Intake Unit. Two months later, Giles was promoted from Trooper I to Detective Sergeant then promoted to Detective Sergeant First Class on January 3, 2004.

Upon his request, in April 2005, Giles was transferred to the Intelligence Section as a squad leader in the Weapons Trafficking Central Unit. Four months later, he was transferred within the same section to the Drug Trafficking Central Unit. Giles was assigned to the Organized Crime Control Bureau as the Administrative Officer from April 2006 to August 2008. He remained in this position for two years, except for a temporary detachment back to the IAB as a Staff Investigator. On August 2, 2008, Giles was transferred to the Official Corruption Section South Unit as an Assistant Unit Head until he left on an administrative absence for three weeks beginning October 4, 2008.

On July 18, 2009, Giles became the Bureau Administration Officer of the Official Corruption Bureau. Approximately one year later, he was transferred to the Drug Trafficking Central Unit – Marijuana Eradication, as a Squad Leader. Giles became the Assistant Unit Head of the Drug Trafficking Central Unit in November 2011, and then the Unit Head of the Drug Trafficking South Unit on April 7, 2012. He was named Acting Lieutenant as

part of his promotion. Eight months later, Giles was transferred to the Cargo Theft Unit as the Unit Head.

On March 8, 2014, Giles was promoted to Lieutenant. Prior to that time, the NJSP had experienced a promotion freeze, which resulted in a two-year gap between Giles's promotion from Acting Lieutenant to Lieutenant.¹ On April 1, 2014, at the age of forty-nine, Giles retired from the NJSP.

IV.

In the final performance evaluation completed while Giles worked in IAB, a period encompassing July 2004 to January 2005, he received marks of "Exceptional" in all job performance categories. After he was assigned to the Intelligence Section, Giles was evaluated by a different supervisor and his marks on the performance evaluations changed from "Exceptional" to "Above Average" and "Satisfactory." During his detachment from the Intelligence Section back to IAB, a performance evaluation was conducted for a period encompassing January 2007 to December 2007. Giles received marks of "Exceptional" in all job performance categories.

On January 24, 2008, Giles submitted a transfer request to Major William Toms seeking to be permanently assigned to IAB.

¹ An Acting Lieutenant possesses the same authority as a Lieutenant and receives a Lieutenant's salary after 120 days.

Giles affirmed that he submitted the request because "it seemed like there was a trend in Intelligence [Section] where I wasn't really being rated properly, they weren't really . . . treating me properly there so I figured I might as well go to Internal Affairs. At least they were fair there." The request was denied "due to improper chain of command involving this request." On January 30, 2008, Giles met with Captain Duane Daniels to discuss the request. Daniels advised Giles he would endorse the transfer when operationally feasible. On April 2, 2008, Giles met with Toms regarding the request, and Toms regarded the meeting as "very positive."

While Giles was detached to IAB, he received a positive quarterly appraisal, completed by a supervisor, encompassing the period from April 1, 2008 until June 30, 2008. On a performance evaluation encompassing the period from August 2008 to December 2008, when Giles worked in the Intelligence Section, he received "Satisfactory" marks.

In November 2009, Giles met with Dalrymple to express his belief that he was qualified for a promotion. According to Giles, Dalrymple explained that based solely on his fifteen-month performance in the Official Corruption Section, he was not deserving of advancement, and stated that there were "too many superstars in the section" for Giles to be promoted. Giles

believed the superstars were all white males. However, Dalrymple stated that he "observed marked improvement in [Giles] performance."

Giles met with Major Matthew Wilson, Commanding Officer of the Intelligence Section in May 2010 to express concerns that he was being discriminated due to his race. Giles believed that he was overlooked for promotions while other "poor workers" were promoted. Wilson directed Giles's complaint to the EEO Unit. Approximately two weeks later, Giles wrote a statement to the EEO proclaiming that "based on my race I have not progressed as my white male [colleagues] have." In the statement, Giles provided the names of six other African-American NJSP members who had allegedly been discriminated against on the basis of race.

In late May 2010, Dalrymple and Lieutenant Thomas T. Goletz met with Giles to discuss a pattern of work-related deficiencies since his transfer to the Official Corruption Section. Giles believed this meeting was in response to his EEO complaint because the incidents discussed were not addressed in his prior performance evaluations. Giles stated that while working with Goletz and Dalrymple, he experienced poor working conditions and "nothing I did for these guys was ever correct." Notwithstanding, on the performance evaluation encompassing the period from January 2010 to June 2010 Giles was rated "Above Average" and "Satisfactory."

On June 4, 2010, Giles was placed on stress leave, which he related to the working conditions with Dalrymple and Goletz.

On July 2, 2010, Giles filed a special report regarding an incident that he believed constituted retaliation. Upon reporting for his first day of duty as Squad Leader in the Marijuana Eradication Unit, Giles "switched places" with another member. Giles claimed that Dalrymple forbade him from switching vehicles with the other member, and instead assigned him a 1999 Chevrolet with 212,000 miles.² When Giles complained, he was assigned a different vehicle.

In mid-May 2011, Patrick issued a supervisory inquiry regarding an incident which involved Giles and two other troopers, Detective Santiago and Detective Widmaier. Members of the Mansfield Township Police Department alleged that Giles and his fellow troopers unnecessarily kicked the door of a suspect's home and attempted to improperly secure consent to search the home. Patrick conducted the supervisory inquiry and recommended that the troopers be counseled. Since Patrick concluded that the troopers' actions were valid and legal, the incident did not warrant an internal investigation.

² The EEO decision that addressed this incident concluded that Dalrymple was not involved in the decision to assign this car to Giles.

As a result of the inquiry, Giles and Widmaier, a white male, received performance notices in their personnel files. Patrick concluded that the actions they took on that date "were not technically sound." Giles appealed shortly thereafter. Upon review, Lieutenant Kenneth Johnson concluded that the performance notice issued to Giles should be removed from his personnel file, and issued a decision on July 19, 2011. The performance notice was removed.

V.

Under the LAD, it is an unlawful employment practice or unlawful discrimination:

a. For an employer, because of the race . . .
. or the nationality of any individual . . .
to refuse to hire or employ or to bar or to
discharge or require to retire . . . from
employment such individual or to discriminate
against such individual in compensation or in
terms, conditions or privileges of
employment[.]

[N.J.S.A. 10:5-12(a).]

New Jersey has adopted the framework established by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) when adjudicating discrimination claims under the LAD. Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 82 (1978). McDonnell-Douglas sets forth the proper test for a prima facie

case and established a burden-shifting framework. 411 U.S. at 802. The burden-shifting procedure is as follows:

(1) the plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination; (2) the defendant then must show a legitimate non-discriminatory reason for its decision; and (3) the plaintiff must then be given the opportunity to show that defendant's stated reason was merely a pretext or discriminatory in its application.

[Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 331 (2010) (citing Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432, 442 (1988)).]

The elements of a prima facie case will vary depending on the discrimination claim, but the plaintiff always bears the burden to establish a prima facie case. Victor v. State, 203 N.J. 383, 409-10 (2010). In the failure to promote context, a claim Giles makes here, a prima facie case may be established by showing:

(1) that [he] is a member of a class protected by the [LAD]; (2) that [he] was qualified for the position or rank sought; (3) that [he] was denied promotion . . . ; and (4) that others . . . with similar or lesser qualifications achieved the rank or position.

[Henry, 204 N.J. at 331 (citing Dixon, 110 N.J. at 443).]

There is a low evidentiary burden for establishing a prima facie case at this stage; the main inquiry is whether discrimination "could be a reason for the employer's action." Ibid. (quoting

Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446-47 (2005)). Under McDonnell-Douglas, "an employee who is a member of a protected group and who is qualified for hiring or promotion may not be rejected for any reason other than the fact that another seemingly qualified individual was selected for some non-invidious reason." Peper, 77 N.J. at 84.

Giles, as an African American, satisfied the first prong. Providing all favorable inferences to Giles, he also satisfied the second prong that he was objectively qualified for the position. Zive, 182 N.J. at 454.³ Giles putatively satisfied the third prong despite having achieved the promotion he sought to the rank of Lieutenant because, arguably, he was earlier wrongfully passed over for a promotion.

As to the fourth prong, plaintiff must show that similarly situated individuals were promoted while he was not. Peper, 77 N.J. at 84. The term "similarly situated" means "persons possessing equivalent qualifications and working in the same job category as plaintiff." Id. at 84-85. Although the list is not exhaustive, the court should examine the relevant qualifications: "educational level, job experience and, most importantly, the quality of work performed" Id. at 85. It is necessary

³ Although, as Giles acknowledged, the promotions that were made occurred at a time when Giles was not eligible for promotion.

for the plaintiff to produce evidence that the people who received the promotions possess equivalent qualifications. Id. at 84.

Here, Giles's argument regarding racial discrimination is premised upon the allegation that while he was assigned to the Intelligence Section, "white, junior members with less experience, education, time and grade" were promoted to Lieutenant while he was not. Giles points to the timeframe from when he was promoted from Sergeant First Class to Lieutenant as the significant period regarding the discrimination and retaliation. Giles argues that his promotional timeline was consistent with other members of his class until he became a Sergeant First Class. According to Giles, it was at this point, after his assignment to the Intelligence Section, that the discrimination commenced and he was not promoted to the Lieutenant position for ten years and two months. Giles argues that this promotional timeline was inconsistent with other members of his class.

Giles was promoted to Detective Sergeant First Class on January 1, 2004. On April 7, 2012, he was promoted to Acting Lieutenant and on March 8, 2014, to Lieutenant. There was a promotion freeze at this time in the NJSP, which resulted in a two-year gap between Giles's promotion from Acting Lieutenant to Lieutenant. From the seventy-two members of Giles's class (Class 105), twenty-one members, including Giles, received a promotion

to Lieutenant. One other African American class member received a promotion from Sergeant First Class to Lieutenant in about three years.

During the trial, Giles referenced five Caucasian troopers who were promoted prior to his promotion. However, Giles presented no specific proof when these individuals were promoted from Sergeant First Class to Lieutenant and the length of time between their promotions. Giles testified generally that one of these five troopers spent "less time in the Intelligence section" and was promoted "within [fifteen] months or so[.]"

The documentary evidence offered by Giles regarding the promotional rankings or qualifications of these other troopers is inconclusive. In some of the records, Giles was ranked higher than two of the individuals he argues were promoted before he was and in others, Giles was ranked lower than these same individuals.

Giles testified that he had no knowledge of the other troopers' "performance evaluations, their quarterly appraisals, the [performance notices] that they got, the commendations that they got."

In sum, notwithstanding his allegations of disparate treatment in the promotion process, Giles failed to provide proof regarding the qualifications of any of the individuals he argues were promoted before he was or whether race played any role in

their promotion. Absent this proof, Giles failed to satisfy the fourth prong, i.e., "that others . . . with similar or lesser qualifications achieved the rank or position." Henry, 204 N.J. at 331 (citing Dixon, 110 N.J. at 443).

Giles next argues that he satisfied his burden for his claim of retaliation. Under the LAD, it is an unlawful employment practice or unlawful discrimination:

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

[N.J.S.A. 10:5-12(d).]

A claim of retaliation under the LAD follows a burden-shifting framework similar to a failure to promote claim. Henry, 204 N.J. at 332 (citing Jamison v. Rockaway Bd. of Ed., 242 N.J. Super. 436, 445-47 (App. Div. 1990)). To establish a prima facie case of retaliation under the LAD a plaintiff must show that:

(1) [he] was in a protected class; (2) [he] engaged in a protected activity known to the employer; (3) [he] was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence.

[Victor, 203 N.J. at 409.]

If the plaintiff is able to establish a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate reason for the employment decision and then the plaintiff has the burden to prove it was a retaliatory intent that motivated the defendant's actions. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996) (citing Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995)).

As to the second prong of a retaliation claim, "a person engages in a protected activity under the LAD when that person opposes any practice rendered unlawful under the LAD." Young v. Hobert W. Grp., 385 N.J. Super. 448, 466 (App. Div. 2005). To be a protected activity, the complaint must concern some act or practice that violates the LAD. Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 375 (App. Div. 2014). In addition, a critical element under this prong is that the protected activity must be "known" to the defendants. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013).

Giles alleges three instances as evidence of retaliation: (1) the supervisory review conducted after the incident that occurred in Mansfield Township; (2) the issuance of the performance notice in his personnel file following the supervisory review; and (3)

the incident regarding the vehicle assignment. He argues that these constitute acts of retaliation done in response to his EEO complaint.

It is without dispute that the EEO complaint constitutes protected activity under the LAD. However, Giles did not present any proof that defendants knew of his complaint. Further, other than temporal proximity, Giles presented no nexus between the alleged acts constituting retaliation.⁴

As this court has held, "the mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two." Young, 385 N.J. Super. at 467 (alteration in original) (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997)). Temporal proximity, on its own, will only support an inference of causation when the facts are so "unusually suggestive of retaliatory motive." Ibid. When these facts are not present, "the plaintiff must set forth other evidence to establish the causal link." Ibid.

⁴ Five days after Giles made his confidential complaint with the EEO, Dalrymple and Goletz met with him regarding "a pattern of deficiencies" while working at the Official Corruption Section. Giles points to this meeting as evidence of retaliatory action following his EEO complaint.

In assessing the third prong, the court must consider the particular facts of a case to determine whether a challenged employment action reaches the level of "adverse" under the LAD. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). The following factors should be considered: "the employee's loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees." Ibid.

Even setting aside the lack of proof on the nexus between the filing of the complaint with the EEO and these subsequent personnel actions, the complained-of actions do not "rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental workplace dissatisfaction." Victor v. State, 401 N.J. Super. 596, 616 (2008). Stated succinctly, the factors constituting adverse employment actions noted in Mancini are not present here.

Accordingly, having considered the trial record in light of the evidence presented, together with the legitimate inferences drawn therefrom, and after application of applicable law, we conclude that the trial court properly granted the dismissal of the complaint.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION